IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5597 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

G S PRAKASH,THE THEN SECRETARY

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 5597 of 2001

MR CHETAN K PANDYA for Petitioner No. 1

MR VIPUL PANCHOLI Ld. APP for Respondent No. 1

MR MAHENDRA K PATEL for Respondent No. 2

NOTICE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 06/02/2002

ORAL JUDGEMENT

Heard learned counsel for the parties.

Rule. Mr. Mahendra K Patel learned counsel waives service of rule on behalf of respondent no. 2-Ori. complainant and Ld. APP Mr. Pancholi waives service of rule on behalf of respondent no. 1-State.

Learned counsel for the parties have taken me through the entire set of facts available on record. The main contention raised by the petitioner is that the present petitioner was serving as Secretary and General Manager only at the relevant point of time and he ought not to have been prosecuted by the complainant but only the company could have been prosecuted and he has been unnecessarily dragged into the criminal proceedings. The second contention raised by Mr. Pandya is that the complainant has no authority or power to file the complaint on behalf of the Trust and the complaint ought to have been filed by and in the name of the Trust. Third contention raised by Mr. Pandya is that the ratio of the decision of this Court in the case of Dipendra G. Choksi & Anr. vs. Kailashchandra C. Dhoot & Anr., reported in 1995(1) GLR p. 424 would squarely applicable to the facts of this case because the complainant cannot be said to be payee or the holder of any due course of cheques which are dishonoured. Last, but the main contention of the petitioner is that there is no averments in the complaint that the cheque was issued in discharge of any legally enforceable debt or liability. The cheques were given to a Trust by way of only donation and, therefore, as per the decision of the Apex Court in the case of Uplanche Mallikarjun & Ors vs. Rat Kanti Vimala & Ors., reported in 1997 Cri.L.J., p. 4237 this proceedings should be terminated.

In response of this submission, Ld. APP has placed reliance on a decision in the case of M/s. M.M.T.C. Ltd. & Anr. vs. M/s. Medchl Chemicals & Pharma (P) Ltd. & Anr., reported in 2001 AIR SCW p.4793. The plea taken by the petitioner before the court are defence plea which can be agitated before the trial court. The present petitioner was active during the transaction and was enjoying the responsible position of GM & Secretary and there is evidence on record that he is a Chartered Accountant. A person managing the affairs of the company can be prosecuted as per the scheme of Negotiable Instrument Act. There are sufficient circumstances on record to show that four cheques of Rs. 300,000/- each amounting to Rs. 12,00,000/ were issued in lieu of the out of court settlement in a civil suit pending at that relevant point of time in the Court of

Civil Judge (JD) at Dholka. It is the say of the prosecution that M/s. N.G.E.F. Ltd. represented by Mr. A.N. Srivastha, Director had entered into an agreement with M/s. Fakirbhai Trading Pvt. Ltd. and M/s. NGEF Ltd. was supplying the pumps on behalf of Shri Fakirbhai Trading Pvt. Ltd. since 1987. There was a litigation between both these companies and the same was pending in the Court of Civil Judge (JD) Dholka. M/s. Fakirbhai Trading Pvt. Ltd. Dholka was the plaintiff in that suit and the settlement was arrived at in the month of April, 1999. By way of out of court settlement, the defendant -company had agreed to pay Rs. 12,00,000/ and the same was to be paid by four different post dated cheques and on this settlement on 20.4.99 a pursis was filed before the Court of Civil Judge (JD) Dholka for withdrawal of the suit filed by M/s. Fakirbhai Trading Pvt. Ltd. Annexure-C, page 19, indicates that there were some exchange of notices, but it seems that defendant of that suit against the accepted liability had agreed to give cheque in favour of the complainant Charitable Trust headed by Fakirbhai Patel, the very person who was managing the affairs of the plaintiff-company. It is submitted that the plaintiff company is a Pvt. Ltd. Company where Fakirbhai Patel and his sons are the main Directors. Document produced by the original complainant along with the affidavit in reply, which is at page 45, clearly indicates that four post dated cheques were handedover to Fakirbhai Trading Pvt. Ltd. and in view of the settlement in Civil Suit No. 154/1997. On the day on which the suit was withdrawn and on the letter-head Fakirbhai Trading Pvt. Ltd. the acknowledgment was given in favour of Mr. T.K. Prabhakar at Dholka. This letter bears number of four cheques and it indicates as follows:

"Dear Sir,

I am to acknowledge the receipt of four cheques of Rs. 3,00,000/ each with a letter in out of court settlement of the suit being No. 154/1997 in the Court of Civil Judge (JD), Dholka in the name of Fakirbhai Patel Charity Trust. At the request of the parties, the amount is going to charity and so the cheques are given in the charity account.

Thanks."

This letter was received on behalf of M/s. NGEF Ltd of a full settlement by T.K. Prabhakar who was present in the Court. It is submitted that this had

happened at the instance of the Secretary and General Manager Mr. GS Prakash that is present petitioner.

So, prima-facie it can be legitimately inferred at this stage that defendant of the civil suit by way of out of court settlement agreed to pay certain amount but it was also agreed that the amount so settled will be paid to the Trust, on this understanding and agreed situation the plaintiff had withdrawn the suit unconditionally, then in that event, the issuance of cheques in favour of Trust can be said to be a cheques issued in discharge of the liability and it is doubtful whether this can be said to be an absolute case of one sided or voluntary (Gratins only) donation and the same were not issued to settle the liability or any adverse claim.

Certain pleas which are taken by the petitioner can be very well be taken before the learned trial judge during the course of trial because the presumption shall have to be rebutted as per the ratio propounded by the Apex Court in the case of Hiten P. Dalal vs. Bratindranath Banerjee, reported in 2001 AIR SCW 3861, where the Apex Court has said that :

"Because both sections 138 & 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras vs. A. Vaidyanatha Iyer, AIR 1958 SC 61: (1958 Cri LJ 232), it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the

non-existence of the presumed fact.

In other words provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." Section 3" : Evidence Act. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of 'prudent man'.

Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantrai Balwantrai Desai v. State of Maharashtra, AIR 1964 SC 575: (1964(1) Cri LJ 437), where this Court reiterated the principles enunciated in State of Madras v. Vaidyanath Iyer (AIR 1958 SC 61 : 1958 Cri LJ 232) (supra) and clarified that the distinction between the two kinds of presumption law not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of discretionary presumption if drawn may be rebutted by an explanation which "might reasonable by true and which is consistent with the innocence" of the accused. On the other hand in the case of mandatory presumption "the burden

resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted..."

The observation of the Supreme court in the case of M/s. M.M.T.C. Ltd. & Anr. vs. M/s. Medchl Chemicals & Pharma (P) Ltd. & Anr., reported in 2001 AIR SCW p. 4793 is also important. Mr. Pancholi has rightly quoted relevant para of the judgment of Apex Court in the case of M/s. M.M.T.C. Ltd. (supra) which I would like to quote :-

"It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability.

In para-16 of the judgment, the Apex Court has said that:

"16. There is therefore no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This

they have to discharge in the trial. At this stage, merely on basis of averments in the Petitions filed by them the High Court could not have concluded that there was no existing debt or liability.

It is not a legal submission that as he is not a signatory of the cheques, he cannot be prosecuted.

For short, there is no merits in the petition. Affidavit in reply filed by the original complainant and the documents produced in support thereof are very relevant and, therefore, it would not be proper for this court to say that this complaint deserves any quashing order, on the contrary, the fact emerging from the record clarifies various contingencies and the dishonest intention in the mind of original accused when he settled the matter and issued the cheques to the Trust for donation.

Hence, this petition is dismissed. Rule is discharged.

Before parting with the order, I would like to observe that the copy of this judgment be sent to Chief Inspecting Officer (Court Fees) and the Chief Commissioner of Income Tax, Ahmedabad. So, both the authorities can examine the transactions and out of court settlement in Civil Suit No. 154 of 1997 for their purpose, if they so desire.

Learned counsel Mr. Pandya for petitioner prays for stay of this order as the petitioner intends to file Special Leave Petition before the Apex Court. Request is not accepted as this Court feels that in couple of days or week the trial court is not going to conclude the trial. If the application for exemption from personal appearance, if made before the trial court, the same shall be decided on merits without being influenced by this order.

(C.K. BUCH, J.)

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